(3)

Supreme Court, U.S.
FILED
FEB 25 2004
OFFICE OF THE CLERK

No. 03-7434

IN THE

Supreme Court of the United States

DANIEL BENITEZ,

Petitioner,

v.

JOHN MATA, INTERIM FIELD OFFICE DIRECTOR, MIAMI BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

~~MOTION FOR LEAVE TO FILE AND BRIEF~~ *AMICI CURIAE* OF REGINA GERMAIN AND IRA KURZBAN IN SUPPORT OF PETITIONER

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF REGINA GERMAIN AND IRA KURZBAN IN SUPPORT OF PETITIONER

Amici respectfully move this Court for leave to file the attached brief amici curiae in support of petitioner. Amici requested consent to file this brief from counsel for all parties on February 23, 2004. Amici received consent from petitioner. Counsel for respondent had not responded to the request for consent as of the time this brief was being printed.

Amici are academics who teach and write about immigration law. They specialize in immigration law and have followed immigration issues throughout their careers. They have written extensively on topics pertaining to immigration and asylum law. They have knowledge of the effect of the Eleventh Circuit decisions upon excludable aliens subject to post-removal detention.

Professor Regina Germain is a visiting professor at the University of Denver College of Law in the Civil Clinic. Previously, she taught as a Fellow at Georgetown University Law Center. From 1995 through 2001, she served as Senior Legal Counselor in the Washington Office of the United Nations High Commissioner for Refugees. In this capacity, she monitored United States compliance with international obligations relating to the treatment of refugees, including site visits to detention centers and immigration courts. Additionally, she made presentations at immigration law conferences and drafted comments on legislation and INS policies impacting refugees. She is the author of AILA's Asylum Primer: A Practical Guide to U.S. Asylum Law and Procedure.

Mr. Ira Kurzban is the author of *Kurzban's Immigration Law Sourcebook,* the most widely used one-volume immigration source in the United States. He is an adjunct faculty member at two law schools, and has lectured and published extensively in the field of immigration law, including articles in the Harvard Law Review. In addition, Mr. Kurzban is a partner in the law firm of Kurzban, Kurzban, Weinger & Tetzeli, P.A.

Amici have no financial or other similar interest in the outcome of this lawsuit or any suits raising similar issues. Their sole interest in this case is to encourage the proper unfolding of law in their areas of specialty.

From their academic and professional backgrounds, amici are aware of consequences upon immigration law if the could government may detain indefinitely excludable aliens because no foreign country will accept the alien. Such detention is not related to the government's goal in regulation, which is to effectuate the removal order. Without another purpose of the confinement, the government's ongoing civil detention of aliens becomes punishment. Additionally, the amici have observed lower courts and the government rely upon vague and attenuated national security concerns in justifying civil detention. The Eleventh Circuit discussed national and border security concerns in upholding indefinite detention, even though there is no finding in the record that Mr. Benitez presents a threat to national security. Under this reasoning, any excludable alien could be subject to indefinite detention based upon unsubstantiated references to national security. This would be detrimental to the development of immigration law.

Because the government's regulatory purpose is thwarted when removal cannot be effectuated, indefinite detention is not permissible without a judicial proceeding. Yet the government is detaining indefinitely excludable aliens who cannot be removed to another country. This ongoing detention is based solely upon an administrative determination that the aliens might be criminal recidivists. It is not subject to judicial review. The only judicial oversight occurs during habeas proceedings. Excludable aliens who are being indefinitely detained have limited access to the judicial system. Hence, the amici have an interest in articulating the effects upon excludable aliens from the Eleventh Circuit's decision.

For the foregoing reasons, amici respectfully request leave to file the accompanying brief amici curiae in support of petitioners.

Respectfully submitted,

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INTEREST OF THE *AMICI CURIAE*

The interest of the *amici curiae* is set forth in the accompanying motion for leave to file this brief.[1]

STATEMENT OF THE CASE

In 1980, an estimated 125,000 Cubans came to the United States from Port Mariel subject to the invitation by President Carter. *See Benitez v. Wallis*, 337 F.3d 1289, 1290 n.1 (11th Cir. 2003) (per curiam). The Immigration and Naturalization Service ("INS") paroled Mr. Benitez into the United States.[2] As one of the Mariel Cubans, he physically entered the United States in 1980. *Id.* at 1290. Mr. Benitez was never admitted to the United States; he is an excludable alien. While in the United States, Mr. Benitez was convicted of crimes on two occasions. *Id.* at 1290-91. He completed his criminal sentence before INS took him into civil custody in a federal prison. *See id.* at 1291. Upon serving his criminal sentence, INS detained Mr. Benitez and entered an order for his removal to Cuba. *Id.* An alien cannot be removed from the United States unless a foreign county issues travel documents. Under Fidel Castro's reign, however, Cuba has refused to accept the Mariel Cubans generally and has rejected Mr. Benitez in particular. Thus, since 2001, Mr. Benitez has remained in detention, with no significant possibility of removal.

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[1] The brief was not authored in whole or in part by counsel for a party to this proceeding, and no person or entity other than the amici curiae made a monetary contribution for preparation of this brief.

[2] For convenience, amici refer to the INS under its former name even though the agency's functions were recently transferred to the Department of Homeland Security.

The Eleventh Circuit found this detention to be indefinite. "[W]e accept Mr. Benitez's claim that he, at present, is subject to indefinite detention." *Id.* at 1293 n.12. There was no finding that Mr. Benitez presented a threat to national security or was a suspected terrorist. The Eleventh Circuit upheld Mr. Benitez's indefinite detention under Section 1231(a)(6).

SUMMARY OF ARGUMENT

The Eleventh Circuit erred in upholding indefinite detention for inadmissible aliens when there is no significant possibility of effectuating his removal to Cuba. The court relied upon attenuated national and border security concerns in upholding indefinite detention. Such concerns do not justify indefinite detention of inadmissible aliens under Section 1231(a)(6), for several reasons.

First, the INS's regulatory interests are protected because release of post-order aliens is subject to supervision. Furthermore, release does not alter an alien's status, and the government may re-detain an alien once a foreign country agrees to accept him because the purpose of the detention would be to effectuate the removal order. To the extent there are broader border interests at stake, the government has not explained why those interests are not protected under other statutes.

Second, the Eleventh Circuit cited national and border security concerns as a reason to grant the government the authority to detain indefinitely excludable aliens under Section 1231(a)(6). Yet, even though the government has not argued that national security concerns were present in this case, the Eleventh Circuit upheld Mr. Benitez's indefinite detention. Under this reasoning, any excludable alien would be subject to indefinite detention, whether or not there is a finding that he threatened to national security. This result conflicts with precedents that granted greater deference

to administrative determinations concerning prolonged detention only when national security concerns were present.

Third, indefinite detention of excludable aliens, such as Mr. Benitez, violates *Zadvydas v. Davis*, 533 U.S. 678 (2001), as long as the government cannot effectuate his removal order. Such detention is neither for a limited time period, nor based upon a judicial finding of special circumstances. Like the aliens in *Zadvydas*, civil detention is indefinite and based solely upon an administrative determination of potential criminal recidivism. The Eleventh Circuit erred in distinguishing *Zadvydas*, which is binding precedent for statutory interpretation of authority to detain excludable aliens under Section 1231(a)(6).

ARGUMENT

I. National Security Is Not Threatened By The Release Of Inadmissible Aliens Who Cannot Be Removed To Their Home Country

The government's statutory argument is based largely on a policy justification, rather than the statute. It argues that the detention of inadmissible aliens is justified on national security grounds. However, *Zadvydas* only applies to a small group of aliens, and the INS can address its genuine regulatory interests through supervised release. To the extent there are any larger national security concerns, the government has not explained why its authority under other statutes would be insufficient to address those concerns. Applying *Zadvydas* to excludable aliens will not leave an "unprotected spot in the Nation's armor." *Zadvydas*, 533 U.S. at 695-96 (internal quotations and citation omitted).

A. The Agency's Regulatory Interests Can Be Sufficiently Addressed Through Supervised Release

1. *Zadvydas* Applies To A Small Group Of Aliens

Section 1231(a)(6) and *Zadvydas* only apply to a narrow category of inadmissible aliens: those who have no significant likelihood of removal to a foreign country. For instance, a few countries, including Cuba and Vietnam, do not have a repatriation agreement with the United States. *E.g., Zadvydas v. Davis*, 533 U.S. at 686 (observing that Ma cannot be removed because the United States does not have a repatriation agreement with Cambodia). Of the detainees who cannot be removed, most are citizens of Laos, Cuba, and Vietnam. 79 *Interpreter Releases* 811 (May 24, 2002). In addition to Benitez, more than 1,750 Mariel Cubans are detained in prison facilities; they are not deportable because Cuba will not accept them. *See Chi Thon Ngo v. INS*, 192 F.3d 390, 395 (3d Cir. 1999). As another example, some excludable aliens are stateless individuals--they claim citizenship of no country. *E.g., Zadvydas*, 533 U.S. at 684 (2001). Some countries do not have an effective government which can accept removal authority. *Ali v. Aschcroft*, 213 F.R.D. 390 (W.D. Wash. 2003) (removal to Somalia in the reasonably foreseeable future is not likely), *aff'd*, 346 F.3d 873 (9th Cir. 2003).

When a foreign country agrees to accept the excludable alien, then the executive branch has authority to re-detain the alien. Because removal is now possible, the detention is limited in duration and for the purpose of effectuating the removal order. Because diplomatic relations are continually evolving, release under *Zadvydas* is not release at large. *E.g., United States ex rel. Janavaris v. Nicolls*, 47 F. Supp. 201, 203 (D. Mass. 1942) (threatening to grant habeas petition of Greek cabin boy insofar as the government could not ensure

the deportation to Greece when the "matter depends on future successful military campaigns"). When removal became reasonably likely the government could then detain the inadmissible alien in order to effectuate the removal order under Section 1231(a)(6).

Historically, the courts have placed limits upon post-deportation detention of aliens, and United States sovereignty has not suffered as a result. *Zadvydas*, 533 U.S. at 697-98 (recognizing that lower courts interpreted statutory silence of the Immigration Act of 1917 to limit detention to a reasonable period). Lower courts have construed the provision of the Immigration Act of 1917, 39 Stat. 874, ch. 29, that aliens were to be "taken into custody and deported," holding that detention was allowed only for a reasonable period of time. *E.g., Caranica v. Nagle*, 28 F.2d 955, 957 (9th Cir. 1928) (observing that the courts will "discharge the appellant from further imprisonment if the government fails to execute the order of deportation within a reasonable time"); *United States ex rel. Ross v. Wallis*, 279 F. 401, 403 (2d Cir. 1922) (limiting detention to a reasonable period).

The political branches concurred in the historical interpretation by the courts. Detention during deportation proceedings should be reserved only for those aliens who posed a threat to national security. *In re Patel*, 15 I & N. Dec. 666, 666 (BIA 1976) (interpreting 8 U.S.C. § 1252(a) to require release of the alien unless "he is a threat to the national security"); *see also O'Rourke v. Warden*, 539 F. Supp. 1131, 1135 (S.D.N.Y. 1982) (describing BIA interpretation that an "alien should be detained or required to post a bond, only if he is a threat to national security"). *Zadvydas* continues this historical trend in limiting post-removal detention to a reasonable time period. Thus, the Court did not impede the political branches' sovereignty in *Zadvydas* though its interpretation of Section 1231(a)(6).

2. Supervised Release Is Not Release At Large

Instead of being indefinitely detained, inadmissible aliens who cannot be removed are subject to supervised release. This is not release at large, and it does not change an alien's immigration status. *Zadvydas*, 533 U.S. at 696. "Supervised release" is subject to tight restrictions, including compliance with the law, continued efforts to obtain travel documents, participation in rehabilitative programs, or submission to medical exams. 8 U.S.C. § 1231(a)(3) (2000); *see also Zadvydas*, 533 U.S. at 699; 66 Fed. Reg. 56,967, 56,978-79 (Nov. 14, 2001) (codified at 8 C.F.R. 241.13(h)). The government has imposed, and courts have upheld, tight restrictions upon release from post-removal detention. Furthermore, an alien would be subject to criminal sanctions if he violated the conditions attached to his parole. *Zadvydas*, 533 U.S. at 700. If they violate the conditions of their supervised release, aliens can even be re-detained.

Release does not change an alien's status; the alien remains subject to a removal order. For example, Mr. Benitez is an excludable alien subject to removal (as soon as Cuba or another country accepts him). Once the State Department obtains travel documents from a foreign country, then it may re-detain the alien pending removal. For example, the United States negotiated an agreement with Cambodia in 2002 to accept the return of deportees. After negotiating the agreement, the INS re-detained many of the Cambodians released under *Zadvydas*.[3] When there is no significant possibility of executing a removal order,

[3] *See* Richard Lewis, *Cambodians Decry Deportation During Providence March*, Associated Press Newswires, Aug. 5, 2002.

supervised release presents a non-punitive alternative to indefinite detention. Such release is subject to tight restrictions, and does not transform the alien's immigration status: if Mr. Benitez were subject to supervised released, he would remain an excludable alien subject to a removal order.

3. An Alien Cannot Thwart His Removal Through *Zadvydas*

The six-month presumption from *Zadvydas* does not apply if the alien has thwarted his own removal. Before *Zadvydas*, courts tolled the limit on the detention period when the alien intentionally prevented the INS from effecting the deportation. *Balogun v. INS*, 9 F.3d 347, 351 (5th Cir. 1993). After *Zadvydas*, courts have continued to follow this line of cases. *Pelich v. INS*, 329 F.3d 1057, 1060 (9th Cir. 2003) (upholding indefinite detention because alien failed to meet burden under *Zadvydas* when the alien refused to cooperate with the INS in the removal process).

B. The Government Has Not Explained Why Other Statutes Are Insufficient To Address National Security Concerns

As the preceding section demonstrates, the INS's regulatory interests with respect to post-order aliens can be sufficiently protected through supervised release. To the extent the INS justifies its reading of Section 1231(a)(6) on larger national security concerns, it has not explained why such concerns are not protected through more specific statutes enacted for that purpose.

1. Detention Authority Before September 11, 2001

The political branches have had authority to detain aliens who presented threats to national security. Section 1231(a)(6) grants authority to the executive branch to detain all aliens subject to removal, including those who are

suspected of terrorism. Historically, Congress has authorized additional detention provisions that are specifically tailored to protect national security. These specific provisions are in addition to general detention provision of Section 1231(a)(6). For example, Congress authorized detention of aliens who were suspected terrorists. 8 U.S.C. §§ 1226(a), (c); *see* Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of the U.S.C.). Such authority was also granted to detain alien enemies. *E.g.*, Enemy Alien Acts of 1798, 1 Stat. 577, derived from act of July 6, 1798 (codified as 50 U.S.C. § 21); 2 Stat. 781, act of July 6, 1812; Alien Registration Act of 1940, 54 Stat. 671-672 (June 28, 1940) (deportation of subversives). These immigration provisions were separate from the detention and removal provision that applied to all aliens subject to deportation. *E.g.*, Immigration Act of 1917, 39 Stat. 874, 889 (providing general detention provisions for aliens subject to deportation); 8 U.S.C. § 1231(a)(6). Thus, the political branches have had separate authority to detain aliens who pose threats to national security.

2. Detention After September 11, 2001

After September 11, 2001, the political branches enacted additional specific statutes and administrative regulations to protect national security. These provisions authorized detention of aliens suspected of terrorism, and they did not amend Section 1231(a)(6), which applies generally to aliens subject to removal. Hence, in fighting the war on terror, the government has detained or arrested aliens suspected of terrorism or terrorist affiliations for questioning under criminal laws or statutes other than § 1231(a)(6).

For example, immediately after September 11, 2001, the federal government detained hundreds of aliens residing within the United States, holding many on criminal charges

unrelated to terrorist activity, including credit card fraud or minor immigration violations.[4]

Most of these detentions occurred pursuant to an interim regulation issued by the Attorney General after September 11, 2001, which allowed detention without charge of aliens for forty-eight hours. These regulations authorized further detention for an "additional reasonable period of time" under "emergency or other extraordinary circumstances." Custody Procedures, 66 Fed. Reg. 48,334, 48,334 (Sept. 20, 2001) (to be to be codified at 8 C.F.R. § 287.3(d)). The regulation does not define "emergency or other extraordinary" circumstances, and the detention can be unrelated to such circumstances. *Administrative Comment, Indefinite Detention Without Probable Cause: A Comment on the INS Interim Rule 8 C.F.R. 287.3*, 26 N.Y.U. Rev. L. & Soc. Change 397 (2000-01). Notably, the PATRIOT Act does not displace these interim regulations. Under these regulations, the executive branch may indefinitely detain an alien without certifying that the alien is a suspected terrorist. Custody Procedures, 66 Fed. Reg. 48,334, 48,334-35 (Sept. 20, 2001) (to be to be codified at 8 C.F.R. § 287.3(d)); *see also Developments in the Law: The Law of Prisons: V. Plight of*

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[4] Human Rights Watch, *World Report 2002: Events of 2001, November 2000-November 2001*, at 487-88 (2002), *available at* http://www.hrw.org /wr2k2/pdf/usa.pdf; *see also* DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Senate Comm. on the Judiciary, 107th Cong. (Dec. 6, 2001) (testimony of Ali-Al-Maqtari, a French teacher from Yemen who was arrested on September 15th and detained for eight weeks), *at* http://www.aia.org/newsroom/23ts1001.html; Robyn E. Blumner, *Ashcroft's Power to Detain Without Charges Continues without Oversight*, St. Petersberg Times, May 5, 2002, at D6 (noting that 104 immigrants remained detained).

the Tempest-Tost: Indefinite Detention of Deportable Aliens, 115 Harv. L. Rev. 1915, 1938 (2002) ("[T]he interim regulation allows the INS to detain indefinitely aliens not certified as terrorists, if it determines that emergency circumstances exist."); Cyrus D. Mehta, *Beware of Indefinite Detention under the USA PATRIOT Act*, Immigration Daily, *available at* http://www.il.com/lawyers/articles/2001,1130-Mehata.shtm.

Furthermore, after September 11, 2001, Congress conferred substantial authority concerning national security upon the executive branch. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"), Pub. L. No. 107-56, 115 Stat. 272 (2001); 66 Fed. Reg. 48,334-35 (Sept. 20, 2001). Under the PATRIOT Act, the Attorney General is authorized to certify that he "has reasonable grounds to believe" that an alien is engaged in terrorist activity or in any other activity endangering the national security.[5] PATRIOT Act, § 412(a), 115 Stat. 350. An alien suspected of terrorist activity must be taken into custody and may be held without charge for up to seven days, after which the government must begin deportation proceedings or bring criminal charges against the

[5] The definition of "terrorist activity" includes the use of a "firearm, or other weapon or dangerous device." 115 Stat. 345 § 411(a)(1)(E)(ii); Civil Liberties and Proposed Anti-Terrorism Legislation: Hearings Before the Subcomm. On the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary, 107th Cong. 6 (2001) (statement of Prof. David Cole) (observing that the definition of "terrorist activity" might encompass the action of a "bar room brawl in which one party threatens another with a broken beer bottle"), *available at* 2001 WL 1171720.

alien. *Id.* § 412(a). Detention continues until the government decertifies the alien, even if he is granted relief from removal. *Id.*

If removal is unlikely in the "reasonably foreseeable future," the alien may be detained for additional periods of up to six months if his release would "threaten the national security of the United States or the safety of the community of any person." *Id.* The Attorney General must review the detention of the aliens certified under the PATRIOT Act every six months and report to Congress the number of aliens certified, grounds for certification, and duration of detention.[6] *Id.* § 412(c). In April of 2002, the Attorney General reported to Congress that not a single immigrant was certified as an alien terrorist. Robyn E. Blumner, *Ashcroft's Power to Detain Without Charges Continues without Oversight*, St. Petersberg Times, May 5, 2002, at D6. The administrative regulations to enact the PATRIOT Act permit the indefinite detention of aliens who are suspected of terrorist activity or who are taken into custody during a time of emergency. 66 Fed. Reg. 48,334-35 (Sept. 20, 2001) (to be codified at 8 C.F.R. 287.3).

Even after the creation of the Department of Homeland Security (which now maintains responsibility for most immigration law enforcement functions), the Attorney General retains discretionary authority to detain inadmissible aliens under carefully defined circumstances. *E.g.*, 8 U.S.C. § 1226(c) (Attorney general is required to detain and has the power to release certain criminal aliens); 8 U.S.C. § 1231(a)(6) (2000) (detention of inadmissible aliens); 8

[6] According to administrative regulations, an inadmissible alien's detention under Section 1231(a)(6) is reviewed annually. 65 Fed. Reg. at 80,297 (Dec. 21, 2000).

U.S.C. § 1537(b)(2)(C) (2000) (concerning post-removal detention of aliens who cannot be removed). Recently, the Attorney General claimed broad authority "controlling legal and policy determinations regarding whether individual aliens should be detained." *In re D-J*, 23 I. & N. Dec. 572, 573-74 (BIA 2003) (citing "considerations of sound immigration policy and national security" to deny bond to a detained alien and asserting that the Attorney General "retains his authority to make controlling determinations with respect to questions of law," even though authority to administer the INA was transferred to the Secretary of Homeland security). These examples reveal that applying *Zadvydas* to excludible aliens will not impede the government's efforts to protect national security.

3. Detention of Admitted Aliens After *Zadvydas*

Even the regulations implemented in response to *Zadvydas* afford the political branches ample authority to protect national security and prevent terrorism. The Attorney General has enacted specific administrative regulations to guide immigration officials in implementing the *Zadvydas* decision for admitted aliens. 8 C.F.R. §§ 241.12-.13 (2003); Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,967 (Nov. 14, 2001) (considering factors for the likelihood of removal to include immigrant's prior efforts to comply with the removal order) (to be codified at 8 C.F.R. pt. 3, 241). These regulations authorize detention for "special circumstances," which are defined as (1) aliens with highly contagious disease; (2) "specially dangerous" removable aliens; (3) aliens whose release would have "serious adverse foreign policy consequences;" and (4) aliens detained due to "security or terrorism concerns." 66 Fed. Reg. at 56,979-82 (Nov. 14, 2001) (to be codified at 8 C.F.R. § 241.14). Immigration judges and the Board of Immigration Appeals may review whether continued

detention upon these grounds is appropriate. No such review, however, is permitted if the Attorney General certifies that an alien should not be released for reasons, including foreign policy consequences, terrorism, or security concerns. Just as *Zadvydas* did not impinge the ability of the political branches to protect national security as applied to admitted aliens, neither will it as applied to excludable aliens, such as Mr. Benitez.

II. The Eleventh Circuit Erred In Relying Exclusively Upon Border and National Security Concerns To Justify Indefinite Detention

The Eleventh Circuit erred in considering attenuated border security concerns to uphold Mr. Benitez's indefinite detention when his case presented no national security concerns. *Benitez*, 337 F.3d at 1300. In limiting *Zadvydas*, the lower court reasoned that "the government historically has enjoyed broad latitude in detaining those aliens until their security threat can be fully ascertained" and concluded that "[r]emoving this important tool from the government's arsenal undoubtedly would subject the residents of this nation to greater security risks." *Id.* The record included no suggestion that Mr. Benitez's indefinite detention is warranted by concerns for national security or border security. Instead, the Eleventh Circuit referred only to vague and indirect benefits upon "security" in justifying Mr. Benitez's indefinite detention. *See id.* (discussing Mr. Benitez's potential for recidivism and concluding generally that he "poses a danger to the community and is likely to engage in further violent behavior, and therefore is a security threat").

A. Mariel Cubans, Such As Mr. Benitez, Are Not A Threat To National Security

Current threats to national security do *not* include inadmissible aliens such as Mr. Benitez. The government

does not perceive Mr. Benitez as a threat to national security or a suspected terrorist. After September 11, 2001, the political branches have enacted numerous systems to identify and monitor individuals who may be threats to national security, including the National Security Entry/Exit Registration System (NSEERS), Student and Exchange Visitor Information System (SEVIS), and the United States Visitor and Immigrant Status Indication Technology (US VISIT).[7]

For example, as part of its efforts to enhance national security, the INS required foreign males from eighteen countries to register with the INS as part of the NSEERS. This registration requirement applied to males of age sixteen or older.[8] In recognition that aliens emigrating to the United

[7] *See* U.S. Immigration and Customs Enforcement (ICE), Investigations: National Security (last modified Feb. 5, 2004), *available at* http://www.ice.gov/graphics /enforce/invest/index. htm; *see also* Department of Homeland Security, *Press Room: Changes to the NSEERS Process*, (Dec. 1, 2003), *available at* http://www.dhs.gov/dhspublic/ theme_home8.jsp ("We have caught suspected terrorists under NSEERS. While they may not be charged with terrorism grounds of inadmissibility or removability, that is not an indication of whether terrorists were caught."); United States General Accounting Office, *Homeland Security: Challenges to Implementing the Immigration Interior Enforcement Strategy*, at 11 Apr. 10, 2003 (GAO-03-660T), *available at* http://www.gpoaccess.gov/gaoreports/index. html.

[8] U.S. Citizenship and Immigration Services, *Statement: INS Reminds Certain Temporary Foreign Visitors of Eighteen Countries of Registration Requirement* (Dec. 6, 2002), *available at* http://uscis.gov/graphics /publicaffairs/pachron.htm (describing the goals of NSEERS as "helping the U.S. to identify wanted criminals and known terrorists entering our borders").

States are not threats to national security, the registration requirement does not apply to lawful permanent residents or asylum applicants. *Id.* Of those who registered for NSEERS, 2,870 were detained and 23 were placed in custody.[9] These individuals were detained under authority other than Section 1231(a)(6).

Finally, of the eighteen countries listed in NSEERS, Cuba was not one of the countries listed.[10] These executive regulations and practices reveal that Mariel Cubans, such as Mr. Benitez, do not constitute threats to national security.

B. Unsubstantiated Border Security Concerns Cannot Justify Indefinite Detention

Under the Eleventh Circuit's rationale, vaguely alleged and unsubstantiated border security concerns could justify indefinite detention of all inadmissible aliens, many of whom do not pose a threat to national security. The Eleventh Circuit relied partly upon concerns over border security to uphold Benitez's indefinite detention. *Benitez*, 337 F.3d at 1300. Nonetheless, these concerns are clearly not present in this case. By upholding Mr. Benitez's indefinite detention when no national security concerns were present or even suggested, the Eleventh Circuit's decision implies that any inadmissible alien could be detained upon these unsubstantiated grounds.

In other areas of constitutional law, the government's reference to vague national security justifications were insufficient to justify governmental action. *See N.Y. Times*

[9] Department of Homeland Security, *Changes to National Security Entry/Exit Registration System (NSEERS)* (Dec. 1, 2003), *available at* http://www.dhs.gov /dhspublic/theme_home8.jsp.

[10] *Id.*

Co. v. United States, 403 U.S. 713, 719 (1971) (observing that "[t]he word 'security' [in a discussion about national security] is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment"); *see also People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1243 (D.C. Cir. 2003); *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 204, 219 (3d Cir. 2002) ("We defer only to the executive insofar as it is expert in matters of national security, not constitutional liberties."); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 705 (6th Cir. 2002) (determining that courts must require particularized evidence supporting the assertion that national security is implicated in a particular First Amendment case); *United States v. McVeigh*, 153 F.3d 1166, 1176 (10th Cir. 1998), *limited on other grounds, United States v. Lazcano-Villalobos*, 175 F.3d 838, 847 (10th Cir. 1999); *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1228 (9th Cir. 1990) (fear of terrorist threat without evidence not sufficient to restrict speech).

Zadvydas recognized instances of suspected terrorism as one instance when determinations of the national government would have receive more deference from courts. 533 U.S. at 696. The heightened deference, however, was limited to cases where the alien posed a genuine threat to national security. Here, the Eleventh Circuit cited generally to national security concerns, but then upheld Mr. Benitez's detention without any evidence or even suggestion by the government that Mr. Benitez was a suspected terrorist. *See Benitez*, 337 F.3d at 1300. In upholding indefinite detention of an excludable alien who does not pose a threat to national security, the Eleventh Circuit eviscerated the narrow exception, recognized in *Zadvydas*, when governmental determinations concerning prolonged detention would be entitled to greater deference.

C. *Mezei* and *Carlson* Do Not Justify Indefinite Detention Here

This Court has upheld prolonged detention of inadmissible aliens, but only upon a finding that the alien was a suspected terrorist or national security risk. It has never expressly authorized post-removal indefinite detention of excludable aliens when national security concerns or other special circumstances were not present. In these cases, the Court accepted the government's contention that the alien presented a threat to national security, and upheld the detention. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 216 (1953) (upholding post-removal detention without a hearing when exclusion was "grounded on danger to the national security"); *Carlson v. Landon*, 342 U.S. 524, 534-35 (1952) (detention of Communists during deportation proceedings without bail).

In *Mezei*, the Court considered whether the government was required to provide a hearing concerning reentry when the government alleged Mezei was a threat to national security. *Mezei*, 345 U.S. at 216, 227. Here, the Court divided over the evidence necessary for demonstrating that an alien constitutes a threat to national security. The majority accepted the government's allegations on their face, upholding the alien's detention without a hearing on national security grounds. *Id.* at 214 (stating that Mezei "simply left the United States and remained behind the Iron Curtain for 19 months"). In contrast, the dissenting opinion recognized the "Communist evil," but concluded that detention of an alien was no longer warranted when removal was not possible. *Id.* at 227.

In *Carlson*, the Court upheld the Attorney General's authority to detain aliens who participated in Communist activities. Here, release of the alien during deportation proceedings could result in "opportunities to hurt the United States during the pendency of deportation proceedings."

Carlson, 342 U.S. at 538, 542 ("There is no denial of the due process of the Fifth Amendment under circumstances where there is a reasonable apprehension of hurt from aliens charged with a philosophy of *violence against this Government*.") (emphasis added).

Both *Mezei* and *Carlson* occurred during a time when the political branches made a determination, as a matter of immigration policy, that Communists were a threat to national security. As of 1949, a Congressional report estimated that 3,278 could not be deported because a foreign country refused to issue travel documents. Of these "undeportables," 2,147 were "iron-curtain nationals, including 1,180 Russians." S. Rep. No. 1515, at 637, 639 (1950); *see also Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1389 (10th Cir. 1981) (discussing the Internal Security Act of 1950 and the Immigration Naturalization Act of 1952, which limited post-deportation order detention to six months even though they were passed during a time when "Congress was painfully aware" of the undeportables). In upholding detentions at issue in *Mezei* and *Carlson*, the Court deferred to the political branches' determinations that aliens affiliated with Communism constituted a threat to national security.

Although cases such as *Mezei* and *Carlson* have been cited to uphold indefinite detention of inadmissible aliens, they are actually cases concerning deference to the government on matters of national security. In these cases, the Court upheld the government's individualized determination that the particular alien at issue actually constituted a threat: specifically, that the alien could be a terrorist or serious threat to national security. *See Mezei*, 345 U.S. at 216; *see also Rosales-Garcia v. Holland*, 322 F.3d 386, 413-14 (6th Cir. 2003) (en banc) ("[T]he *Mezei* Court explicitly grounded its decision in the special circumstances of a national emergency."); *Rodriguez-Fernandez*, 654 F.2d

at 1388 (distinguishing *Mezei* on grounds of national security).

In this same vein, *Zadvydas* recognized two instances when the government would be entitled to more deference in prolonged detention. *Zadvydas*, 533 U.S. at 696. Under these exceptions, detention of an alien who is a suspected terrorist or a person with a serious mental illness would be permissible under *Zadvydas*. Such a detention would also be permissible under provisions separate and independent from Section 1231(a)(6), which pertain to suspected terrorists. *See id*. Absent an individualized determination that an alien is a threat to national security, indefinite detention is not appropriate. *Bezman v. Ashcroft*, 245 F. Supp. 2d 446, 450-51 (D. Conn. 2003) (civil confinement pending appeal on bond determination). Although upholding prolonged detention of aliens upon grounds of national security, this Court has not sanctioned indefinite detention of aliens, such as Mr. Benitez, who were not national security threats. Thus, the Eleventh Circuit erred in basing its decision upon attenuated security concerns when this case presents no finding or suggestion of a threat to national security.[11]

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[11] Even if the Attorney General argues that the current statutory and administrative regimes are not effective for protecting border security after *Zadvydas*, then the proper forum for resolving the Government's concerns regarding national security is Congress – not the courts. *See United States v. Witkovich*, 140 F. Supp. 815, 820 (N.D. Ill. 1956) ("[I]f it is physically impossible to deport him, and if increasing numbers of aliens in this situation has created a serious problem, then Congress may solve it."), *aff'd*, 353 U.S. 194 (1957).

III. Excludable Aliens Are Being Indefinitely Detained With No Significant Possibility of Removal

A. Post-Order Detention On Criminal Recidivism Grounds Violates *Zadvydas*

Based solely upon an administrative determination that an excludable alien, such as Mr. Benitez, has criminal tendencies, the Eleventh Circuit upheld the government's authority to indefinitely detention such aliens under Section 1231(a)(6). In its decision, the court distinguished *Zadvydas*, which disallowed indefinite detention under the exact same statutory provision used to detain excludable aliens. Section 1231(a)(6) applies to inadmissible aliens, which encompasses excludable aliens such as Mr. Benitez. Contrary to the Eleventh Circuit's decision, *Zadvydas* is binding precedent for the statutory interpretation of the permissible length of detention.

The Eleventh Circuit described the issue as whether an excludable alien has a "right to parole." *Benitez*, 337 F.3d at 1300. This fundamentally misunderstands the Court's holding in *Zadvydas* and the constitutional concerns raised by indefinite detention based upon an informal administrative proceeding. Like *Zadvydas*, this case addresses whether an administrative decision may require post-removal indefinite detention of an excludable alien: there is no significant possibility of the aliens' removal, there has been no adjudicative determination of his future dangerousness, and there has been no criminal proceedings charging him with suspected terrorism. Also like *Zadvydas*, this case does not involve border security concerns when the government has particular information concerning the excludable aliens. *See Zadvydas*, 533 U.S. at 695-96 (commenting that the case did not involve the "political branches' authority to control entry into the United States"). Finally, this case does not present the question of the national government's authority to detain

aliens for a reasonable time pending their removal. Like other aliens subject to indefinite detention, Mr. Benitez is challenging neither the removal order, nor INS authority to detain aliens during removal proceedings. *Benitez*, 337 F.3d at 1292-93.[12]

Mr. Benitez epitomizes the group of inadmissible aliens who cannot be removed from the United States because no foreign country will accept them. An administrative determination, without judicial review, subjects these aliens to post-removal indefinite detention under Section 1231(a)(6). Because there is no significant likelihood of removing such an alien to a foreign country, the purpose of continued detention is clearly not to effectuate the removal order. Rather, like the detention in *Zadvydas*, the purpose of this detention can only be preventive: either to prevent flight or protect the community from a criminal who has already served his time. As the Court recognized in *Zadvydas*, the government's interest in preventing flight diminishes as a grounds for detaining the alien when it is not possible to effectuate his removal. *Zadvydas*, 533 U.S. at 690. Thus, the only grounds for detaining Mr. Benitez is that he might pose a risk of criminal recidivism.

Mr. Benitez's indefinite detention is not justifiable on grounds other than potential recidivism. For example, the record does not include any finding of special circumstances,

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[12] The Eleventh Circuit cited cases in which admitted or resident aliens are entitled to greater procedural protections than excludable aliens in determining whether they are entitled to remain in the country. *Benitez*, 337 F.3d at 1296-97. These cases are inapposite, however, because Mr. Benitez is not challenging the procedures used to enter his removal order. The only issue is whether the government may subject excludible aliens to indefinite post-removal detention.

such as serious mental illness, that would satisfy the criteria for civil commitment. Additionally, the government has offered no argument that he constitutes a threat to national security. Nor is there any evidence to imply that he is a suspected terrorist. Like the detention prohibited in *Zadvydas*, Mr. Benitez is being indefinitely detained because of an administrative determination that he poses a danger to the local community. With no significant possibility of removal to Cuba or any other country, Mr. Benitez's continued detention under Section 1231(a)(6) violates *Zadvydas*.

B. Adoption Of the INS's Reading Would Have Broad Ramifications

The Eleventh Circuit's decision permits indefinite detention of excludable aliens, even if they have not committed a serious offense. When a foreign country refuses to accept an excludable alien, such as Mr. Benitez, the only purpose of his ongoing indefinite detention is preventive: to protect the local community from a potential criminal recidivist.

Yet, in upholding indefinite detention of excludable aliens on these grounds, the Eleventh Circuit's decision has broad ramifications. It sanctions authority for the executive branch to detain indefinitely inadmissible aliens, even ones who have not committed a serious offense. A broad category of aliens are subject to removal, including aliens who are convicted of crimes of moral turpitude or of "miscellaneous crimes." 8 U.S.C. § 1226(c) (2000). After a removal order has been entered, inadmissible aliens are detained under Section 1231(a)(6). Thus, the Attorney General may impose post-removal detention on aliens who were ordered removed for many reasons, including tourist visa violations. *E.g.*, *Borrero v. Aljets*, 325 F.3d 1003, 1006 (8th Cir. 2003); *Bini v. Aljets*, 36 Fed. Appx. 868, 869 (8th Cir. 2002) (upholding continued detention for alien who committed two crimes of moral turpitude); *Elkins v. Comfort*, 245 F. Supp. 2d 1161, 1163 (D. Colo. 2003) (alien was excludable partly for lacking an immigrant visa, even though the alien was married to a United States serviceman).

Section 1231(a)(6) is distinguishable from the statute upheld in *United States v. Salerno*, 481 U.S. 739 (1987), which provided for detention limited to a finite time period and was confined to people who were involved in serious crimes. *Id.* at 747. In contrast, under the Eleventh Circuit's decision, aliens convicted of a non-serious crime could be subject to indefinite detention.

C. Prolonged Detention Is Warranted Only By Special Circumstances, Which Are Not Present Here

This Court has upheld prolonged detention only upon judicial determination of special circumstances warranting detention. Under the lower court's decision, an excludable alien may be indefinitely detained under Section 1231(a)(6) with no judicial proceeding and no judicial review of the administrative decision. Administrative regulations generally govern post-removal detention of excludable aliens beyond the ninety-day removal period. 8 C.F.R. § 241.4 (2003) (regulations concerning when the Attorney General exercises discretion to detain under Section 1231(a)(6)). Separate administrative regulations, however, apply to Mariel Cubans. 8 C.F.R. § 212.12 (2003) (Cuban Review Plan). Although the Cuban Review Plan provides seven factors to be considered in the administrative parole determination, the administrative regulations do not require a finding of special circumstances to uphold indefinite detention. Furthermore, neither possibility of repatriation nor length of detention is listed in the Cuban Review Plan, both of which were crucial factors discussed in *Zadvydas*. *See id.* § 212.12(d)(3). Hence, the administrative decision-maker may indefinitely

detain inadmissible aliens without analyzing the very factors that made the detention impermissible in *Zadvydas*.

Even in the immigration context, there is an arbitrariness limit to government treatment of aliens, which applies to post-removal detention. *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting). Lower court cases suggest that some administrative determinations arbitrarily impose post-removal indefinite detention. *E.g., Gonzalez v. Ashcroft*, 278 F. Supp. 2d 402, 416 (D.N.J. 2003) (holding that detention for more than one year without parole review violates Cuban Review Plan). Even post-*Zadvydas* cases suggest agency reluctance to implement this Court's decision as applied to admitted aliens.[13] For example, in one case, the INS repeatedly recommended release of a Liberian national during his four-year detention until he filed a habeas petition, at which time the INS revoked its recommendation. *E.g., Seretse-Khama v. Ashcroft*, Civ. No. 02-0955, 2002 U.S. Dist. LEXIS 13547, **12, 33 (D.D.C. July 22, 2002) (describing the INS response as "woefully short" to the alien's showing that he was not likely to be removed). The court held that nothing in the record explained why the alien was not released. *Id.*

Outside of the context of immigration policy, courts have found excludable aliens fall within the protection of the Constitution, including protections during a criminal trial. *E.g., Plyler v. Doe*, 457 U.S. 202 (1982) (alien children may

[13] Elizabeth Amon, *INS Flouts High Court on Prisoners, Critics Say*, Nat'l L.J., Aug. 15, 2002, http://www.law.com/jsp/article.jsp?id=1028906395219 (discussing *Kasarov et al. v. Ashcroft*, No. 1:02-CV-5097 (N.D. Ill. July 25, 2002), which is a class action suit alleging that the government "has implemented regulations that have the effect of obstructing and hindering the Supreme Court's decision" in *Zadvydas*).

claim benefit of the Equal Protection Clause of the Fourteenth Amendment); *Wong Wing v. United States*, 163 U.S. 228, 237-38 (1896) (substantive due process); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); *see also Lynch v. Cannatella*, 810 F.2d 1363, 1375 (5th Cir. 1987) (noting excludable aliens are persons under the Fourteenth Amendment). When no foreign country will accept the alien, post-removal detention is not solely in the immigration context, and other constitutional concerns apply to determine whether the indefinite detention is permissible. Even within the immigration context, excludable aliens possess some due process rights concerning their physical liberty in the means of implementing immigration policy. *E.g., Ngo v. INS*, 192 F.3d 390, 399 (3d Cir. 1999) (excludable aliens are entitled to periodic review of their continued detention if they cannot be removed); *see also Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987) (excludable aliens have protection under due process clause from intentionally abusive detention conditions).

The Eleventh Circuit erred in upholding indefinite civil detention of an excludable alien under Section 1231(a)(6). Unless warranted by special circumstances, such indefinite detention does not effectuate an alien's removal when a foreign country refuses to accept an alien in detention. Thus, detention must be justified on other grounds, but the Eleventh Circuit fails to do so. *E.g., United States ex rel. Ross v. Wallis*, 279 F. 401, 403-04 (2d Cir. 1922) ("[T]he right to deport does not include any right of indefinite imprisonment under the guise of awaiting an opportunity for deportation."); *Petition of Brooks*, 5 F.2d 238, 239 (D. Mass. 1925) ("The right to arrest and hold or imprison an alien is nothing but a necessary incident of the right to exclude or deport. There is no power in this court or in any other tribunal in this country to hold indefinitely any sane citizen or alien in imprisonment, except as punishment for a

crime."). To be upheld, indefinite civil detention must be non-punitive and justified by special circumstances, such as serious mental illness. *Zadvydas*, 533 U.S. at 678 (assuming that the objectives for detaining Zadvydas and Ma were non-punitive and concluding that no special justification was present). If an excludable alien is indefinitely detained under Section 1231(a)(6) without a finding of special circumstances, then his detention is punitive.

Congress may not enact legislation that punishes aliens without providing for a criminal trial--this principle applies to excludable aliens in post-removal detention. *See Zadvydas*, 533 U.S. at 704 (Scalia, J., dissenting) (aliens cannot be tortured); *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (holding detainee may not be punished without an adjudication of guilt per the due process clause); *Wong Wing v. United States*, 163 U.S. 228, 237-38 (1896) (striking statute that imposed hard labor on aliens in detention after deportation order issued). When an alien is subject to post-removal indefinite detention with no significant possibility of removal, that detention constitutes punishment unless justified on other grounds. Because INS does not have adequate detention facilities, many aliens, including Mr. Benitez, are detained in federal and state prison facilities. *Armentero v. INS*, 340 F.3d 1058, 1068 (9th Cir. 2003) (reporting that more than 10,000 immigrants are detained in local jails and state prisons) (citing Michael Welch, Detained: Immigration Laws and the Expanding INS Jail Complex 108 (2002)). Because the INS cannot effectuate his removal to another country, an excludable alien's ongoing indefinite detention becomes impermissible punishment, which may be justified only in a judicial proceeding.

Rather than release excludable aliens under orders of supervision, the government continues to detain them even though they cannot be removed. This indefinite detention is based solely upon an informal administrative determination

that they presents a danger to the community as potential recidivist. In *Zadvydas*, the Court rejected potential criminal recidivism as a sufficient basis for indefinite detention of inadmissible aliens. This Court explicitly distinguished such indefinite detention from two cases in which prolonged detention would be authorized on grounds other than Section 1231(a)(6). First, terrorism is a case when "special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security." *Zadvydas*, 533 U.S. at 696. Second, the Court has upheld prolonged civil commitment when such detention is "limited to specially dangerous individuals and subject to strong procedural protections," which capture only those cases where there is a "special justification" such as a "harm-threatening mental illness." *Zadvydas*, 533 U.S. at 690-91; *see also Kansas v. Hendricks*, 521 U.S. 346, 368 (1997) (upholding detention scheme with stringent procedural protections that confines "a small segment of particularly dangerous individuals" who had a mental abnormality); *Foucha v. Louisiana*, 504 U.S. 71, 82-83 (1992) (holding due process prohibits indefinite detention of an insanity acquittee and determining state failed to establish danger to society by clear and convincing evidence).

Because there is no reasonable possibility of removing excludable aliens, such as Mr. Benitez, the government cannot claim that he is being detained for a limited period to effectuate the removal order. In other cases, the Court has upheld detention when it is of limited duration. *E.g.*, *Schall v. Martin*, 467 U.S. 253, 269 (1984) (upholding pretrial detention of juvenile, which is "strictly limited in time"); *Jones v. United States*, 463 U.S. 354, 368, 370 (1983) (authorizing civil commitment of a person, who receives an insanity judgment, only for the period during which the person was both mentally ill and dangerous); *Carlson v.*

Landon, 342 U.S. 524 (1952) (considering detention of potentially dangerous aliens during period pending determination of deportability, which is typically short time period); *see also Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387 (10th Cir. 1981) (upholding detention pending deportation because it is "justifiable only as a necessary, temporary measure"). In contrast, detention is not limited in duration when the excludable alien cannot be removed.

Furthermore, in cases upholding "preventive detention . . . of potentially *indefinite* duration," however, the potential for recidivism has never been enough, and the Court required "some other special circumstance, such as mental illness, that helps to create the danger." *Zadvydas*, 533 U.S. at 691; *see also Kansas v. Crane*, 534 U.S. 407, 412 (2002) (requiring a lack of control determination "lest 'civil commitment' become a 'mechanism for retribution or general deterrence' -- functions properly those of criminal law, and not civil commitment") (quoting *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) (Kennedy, J., concurring)). Moreover, in each of these cases, a judicial proceeding determined the special circumstances and limited time period. David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 Emory L.J. 1003, 1014 (2002) (recognizing that "with the exception of enemy aliens during wartime, the Supreme Court has upheld civil detention" only after a judicial proceeding to determine individualized need).

Unlike the cases in which the Court has upheld confinement, Mr. Benitez's detention is of unlimited duration and imposed by an administrative determination, which did not require special circumstances. Thus, this case is unlike *United States v. Salerno*, which upheld pretrial preventative detention because there was a short time until trial, detention was reserved for the "most serious of crimes," and detention was imposed only after complying with judicial protections,

including proof of dangerousness by clear and convincing evidence. 481 U.S. 739, 747, 750-52 (1992). Civil detention of a limited time period has been upheld only under judicial determination of special circumstances, such as severe mental illness. Unlike the detention at issue in *Salerno*, indefinite detention under Section 1231(a)(6) is neither limited in time period nor reserved to the most serious criminals. It is undisputed that no judicial proceeding or finding of special circumstances occurred here. The only ground to justify Mr. Benitez's detention under Section 1231(a)(6) is preventative: to protect the local community from the mere hunch that he is a criminal recidivist. This does not satisfy the doctrinal requirements for upholding civil detention. Such ongoing detention of excludable aliens becomes punishment, which is prohibited without a judicial proceeding.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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February 25, 2004